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# In the Supreme Court of the United States

DIXIE DISTRIBUTING COMPANY; HARRY C. DENUNE

*Petitioners,*

v.

CARTER-JONES LUMBER CO.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

TERENCE L. GALLAGHER
KEITH A. KAVINSKY
*Gallagher & Kavinsky*
*400 South Fifth Street*
*Suite 304*
*Columbus, OH 43215*
*(614) 221-3536*

KENNETH S. GELLER
*Counsel of Record*
THOMAS B. COLBY
*Mayer, Brown & Platt*
*1909 K Street, N.W.*
*Washington, DC 20006*
*(202) 263-3000*

*Counsel for Petitioners*

## QUESTIONS PRESENTED

1. Whether it is permissible under *United States* v. *Bestfoods*, 524 U.S. 51 (1998), to determine the question of indirect, derivative CERCLA liability by examining the relationship between a shareholder of a corporation and the acts of pollution, rather than the relationship between the shareholder and the corporation generally.

2. Whether a federal court should certify an issue of state law to the state supreme court in circumstances in which there is some persuasive authority from the state intermediate appellate courts, but the only authority from the state supreme court seems at least implicitly to contradict the appellate court opinions.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies and there are no publicly held corporations holding more than 10% of their stock.

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### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 237 F.3d 745. The opinion of the district court (App., *infra*, 13a-24a) is unreported. The prior opinion of the court of appeals (App., *infra*, 25a-36a) is reported at 166 F.3d 840. The prior opinion of the district court (App., *infra*, 37a-68a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 23, 2001. The court of appeals denied rehearing on March 16, 2001. App., *infra*, 74a-75a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9607(a) & 9613(f)(1), are reproduced at App., *infra*, 76a-78a.

### STATEMENT

This case, which arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, warrants this Court's review in two important respects. First, the decision below utterly eviscerates the distinction between direct and indirect CERCLA liability that formed the very heart of this Court's recent decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998). Second, the Sixth Circuit violated core principles of federalism and comity by refusing to afford the Supreme Court of Ohio the opportunity to resolve an important issue of state law in circumstances in which other circuits have

found certification to be necessary. The Court should grant certiorari to resolve the conflict among the circuits and to vindicate *Bestfoods*.

1. Petitioners are Dixie Distributing Company (Dixie) and its sole shareholder, Harry C. Denune. Dixie is an Ohio corporation that has engaged in the legitimate businesses of selling motorcycle parts and purchasing machinery at auction for sale. App., *infra*, 3a. It has had between 20 and 25 employees in Columbus and Springfield, Ohio. *Ibid.* It held annual meetings of its board of directors and of its shareholders every year from 1985 to 1999 and several special meetings in 1995. App., *infra*, 4a. Denune served as director through 1989. *Ibid.* He did not commingle personal and corporate funds, and the corporation was sufficiently capitalized at all relevant times. *Ibid.*

Although Denune exercised significant control over the affairs of Dixie, by no means did he control every aspect of the corporation's affairs or every transaction in which the corporation engaged. *Ibid.* For instance, Dixie's employees handled the company's payroll and petty cash accounts and the management of its motorcycle parts sales. *Ibid.*

In October 1985, Dixie purchased a number of transformers containing polychlorinated biphenyls (PCBs). App., *infra*, 26a. In June 1987, Dixie sold several of the contaminated transformers to Top Dollar Liquidators (Top Dollar). App., *infra*, 27a. There was testimony at trial suggesting that Denune entered into an agreement with a principal at Top Dollar to hide the transformers from the Ohio Environmental Protection Agency (OEPA). *Ibid.* Top Dollar moved the transformers to a facility in Columbus at night without a permit. *Ibid.* The transformers were then moved to another property in Columbus, leased by Top Dollar from respondent Carter-Jones Lumber

Company (Carter-Jones). *Ibid.* The transformers remained locked and stationary in a trailer on that property for approximately one year. *Ibid.*

In July 1988, the OEPA received a citizen complaint notifying it of the presence of the transformers on Carter-Jones' property. *Ibid.* OEPA conducted an inspection and discovered the transformers, which had begun to leak. App., *infra*, 27a-28a. OEPA then took steps to have the site cleaned. App., *infra*, 28a. In July 1990, Carter-Jones entered into a Consent Order to clean up the property, and it ultimately incurred cleanup costs of over $3 million. App., *infra*, 29a.

2. In 1992, Carter-Jones initiated this private cost-recovery action against Dixie and Denune (and other defendants not parties to this appeal) pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613(f), which entitles a person who incurs cleanup costs to bring a contribution action in federal court against the responsible parties. After a bench trial, the district court found that both Dixie and Denune had "arranged for disposal" of hazardous substances and were therefore liable for cleanup costs under 42 U.S.C. § 9607(a)(3). App., *infra*, 49a-54a. The district court apportioned 50% of the liability for the costs to Dixie and 30% to Denune. App., *infra*, 56a-60a. The district court initially found Dixie and Denune to be jointly and severally liable (App., *infra*, 67a, 69a-70a), but upon petition for reconsideration it amended its order to make them severally liable only (App., *infra*, 71a-73a).

On appeal, the Sixth Circuit affirmed in part, reversed in part, and remanded. App., *infra*, 25a-36a. Applying this Court's decision in *Bestfoods* — which had issued during the pendency of the appeal — the Sixth Circuit concluded that the district court properly held Denune personally liable for a portion of the cleanup costs because *Bestfoods* establishes that

a corporate shareholder can be held directly liable for acts of pollution if the shareholder was directly and personally involved in the wrongful acts, as the evidence indicated here. App., *infra*, 32a-34a (citing *Bestfoods*, 524 U.S. at 55).

The Sixth Circuit declined to decide whether joint and several liability could be imposed under federal common law to put Denune on the hook for Dixie's portion of the cleanup costs as well, because it concluded that application of Ohio veil-piercing law might well render the issue academic. App., *infra*, 34a-36a. The court noted that *Bestfoods* holds that, in addition to incurring *direct* liability for his own wrongdoing, a shareholder can incur *indirect*, derivative liability for the corporation's wrongdoing if he so controlled the corporation as to warrant veil-piercing under the common law. 524 U.S. at 55. Thus, the Sixth Circuit reasoned, if the corporate veil could be pierced under Ohio law, Denune would be liable for both his own and Dixie's share of the cleanup costs, and there would be no need to determine whether CERCLA provides for joint and several liability. App., *infra*, 34a-36a. Because the district court had not considered the veil-piercing issue, the Sixth Circuit remanded for further proceedings. App., *infra*, 36a.

3. On remand, the district court conducted an evidentiary hearing and ruled that the corporate veil could be pierced under Ohio law, and therefore that Denune was jointly liable for the award against Dixie. App., *infra*, 13a-24a. The court noted that Ohio law does not allow veil piercing unless the corporation had "no separate mind, will, or existence of its own" — a standard that seemingly cannot be met here, given Dixie's significant independent existence — but it found that test to be satisfied because Denune controlled and directed the *specific wrongful transactions* to such a degree that the corporate will was overcome *with respect to those transactions only*. App., *infra*, 19a.

The Sixth Circuit affirmed. App., *infra*, 1a-12a. The court of appeals took note of the leading Ohio case on veil-piercing, *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993), in which the Ohio Supreme Court promulgated a three-pronged test that must be met to pierce the corporate veil:

> "• control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own;
>
> • control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and
>
> • injury or unjust loss resulted to the plaintiff from such control and wrong."

App., *infra*, 6a (quoting *Belvedere*, 617 N.E.2d at 1086).

Because the district court's fact findings place the second and third prongs beyond dispute, this case turns, as the district court had determined, on the first prong: whether the "control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own."

The Sixth Circuit freely acknowledged that "Denune did *not* control every aspect of Dixie's affairs or every transaction" into which Dixie entered. App., *infra*, 4a (emphasis added). Indeed, as noted above (at page 2), it is undisputed that Dixie maintained a vigorous and legitimate existence outside of Denune. Thus, the question before the court of appeals was whether the district court was correct in holding that the first prong of the *Belvedere* test could be met by considering "only the extent of Denune's control of the illegal transaction at issue

in the underlying lawsuit," rather than Denune's control over Dixie's affairs generally. App., *infra*, 7a.

Although the Ohio Supreme Court has never addressed that question, and notwithstanding the fact that the plain language of the *Belvedere* test strongly suggests that it would answer it in the negative, the Sixth Circuit declined without comment petitioners' request to certify this important issue to the State's highest court. App., *infra*, 3a, 12a. Rather, the court of appeals chose to divine an answer on its own from two decisions of Ohio's intermediate appellate courts: *Janos* v. *Murduck*, 672 N.E.2d 1021 (Ohio Ct. App. 1996), in which the Ohio court "focused on control of the single transaction at issue in the case" (App., *infra*, 10a); and *Sintel, Inc.* v. *Budget Systems*, No. 74249, 1999 WL 401409 (Ohio Ct. App. June 17, 1999), which "contains some indication that control of the particular transaction at issue, rather than control of the corporation more generally, is important to the Ohio courts" (App., *infra*, 10a n.6).

Relying on *Janos* and *Sintel*, the court of appeals upheld the district court's conclusion that the corporate veil could be pierced based *solely* on the fact that Denune "controlled the particular transactions that constituted the CERCLA violations for which Dixie was found liable." App., *infra*, 4a. The Sixth Circuit rejected petitioners' argument that basing indirect, derivative CERCLA liability on the degree of control over the wrongful transaction, rather than the degree of control over the corporation as a whole, violates *Bestfoods* by eradicating the distinction between direct and indirect liability that this Court took pains to draw:

> In *Bestfoods*, a unanimous Court held that mere control of a corporation was not enough to impose direct CERCLA liability on the shareholder, but that

> derivative liability could exist if the corporate veil could be pierced. See *Bestfoods*, 524 U.S. at 55. Denune argues that the district court here wrongly focused its attention on the relationship between him and the act of wrongdoing rather than on the relationship between him and Dixie. In other words, he argues that the court wrongly applied the test for direct liability to determine whether indirect liability existed.
>
> This argument misses the point of *Bestfoods*. The Supreme Court makes it clear that courts should continue to look to the common law to determine whether to hold a corporate shareholder personally liable for the acts of the corporation in the CERCLA context. See *Bestfoods*, 524 U.S. at 63-64. The fact that Ohio common law, in this case, allows veil piercing under roughly the same conditions that CERCLA imposes direct liability is a coincidental fact about Ohio law.

App., *infra*, 10a-11a.

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision raises two important issues that warrant this Court's review.

First, by expressly basing its analysis of whether to impose derivative CERCLA liability on the relationship between the shareholder and the wrongful acts, instead of the relationship between the shareholder and the corporation, the Sixth Circuit has blatantly run afoul of this Court's decision in *Bestfoods*. Indeed, the entire thrust of the *Bestfoods* opinion was an admonition to the courts of appeals to stop confusing direct and indirect liability and to adhere to the cardinal principle that the relationship between the shareholder and the wrongful acts is

relevant only to the issue of *direct* liability; the test for *indirect* liability must focus instead on the relationship between the shareholder and the corporation generally. See 524 U.S. at 67. The Court should grant certiorari to clarify and reinforce the distinction between direct and indirect liability.

Second, by refusing to certify the dispositive issue of Ohio law to the Supreme Court of Ohio, the Sixth Circuit has created a conflict among the federal courts of appeals. As the Second Circuit and other courts of appeals have recognized, core principles of federalism and comity necessitate certification where, as here, the only decisions ostensibly on point are those of the state's intermediate appellate courts, and the general language of the opinions of the state supreme court — which has not squarely addressed the issue — casts some doubt on the holdings of the state's intermediate appellate courts. See *Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998); *Grubbs* v. *Gulf Int'l Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993); *In re KF Dairies, Inc.*, 179 F.3d 1226, 1226-27 (9th Cir. 1999); *Blanchard* v. *State Farm Mut. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990). Indeed, the failure to certify in these circumstances has the functional effect of funneling litigation into federal court and depriving the state's highest court of its ability to articulate and develop state law. See *Todd* v. *Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc); *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 157-58 (2d Cir. 1997) (Calabresi, J., dissenting).

The Court should grant certiorari to resolve this conflict among the circuits and to consider the federalism implications of federal courts' aggregating unto themselves the power to make state policy.

## I. The Sixth Circuit's Decision Is Squarely Inconsistent With *Bestfoods*

Notwithstanding its protests to the contrary, the Sixth Circuit's ruling is fundamentally inconsistent with this Court's decision in *Bestfoods*.

In *Bestfoods*, the Court articulated two distinct paths to shareholder liability under CERCLA — direct liability for the shareholder's own acts and derivative liability for the acts of the corporation — and it made clear that it would not tolerate the "fusion of direct and indirect liability." 524 U.S. at 67. Rather, "direct liability for the [shareholder's active participation in the acts of pollution] is to be kept distinct from derivative liability for the [corporation's own actions]." *Ibid.* Thus, "*the focus of the enquiry must necessarily be different under the two tests.*" *Id.* at 67-68 (emphasis added). Indirect liability — that is, derivative liability — looks to the relationship between the shareholder and the corporation generally. *Ibid.* Any analysis of the relationship between the shareholder and the specific acts of pollution, on the other hand, goes only to the question of direct liability. *Ibid.*

Yet in the instant case, the Sixth Circuit freely conceded that it determined the question of indirect liability by examining "the relationship between [the shareholder] and the act of wrongdoing rather than * * * the relationship between [the shareholder] and [the corporation]." App., *infra*, 11a. That is a blatant violation of *Bestfoods*.

The Sixth Circuit defended its actions by claiming that *Bestfoods* "makes it clear that courts should continue to look to the common law to determine whether to hold a corporate shareholder personally liable for the acts of the corporation in the CERCLA context," and "[t]he fact that Ohio common law, in this case, allows veil piercing under roughly the same

conditions that CERCLA imposes direct liability is a coincidental fact about Ohio law." *Ibid.*

That analysis is mistaken. *Bestfoods* holds that there are two ways to determine shareholder liability under CERCLA: (1) by examining the shareholder's control over the wrongful acts to determine whether the shareholder is *directly* liable for those acts; and (2) by examining the shareholder's control over the corporation as a whole to determine whether the shareholder is *indirectly* liable for any and all wrongful corporate acts. 524 U.S. at 67.

CERCLA incorporates the common law in fashioning the contours of the second inquiry. But, by definition, the common law rule that is being incorporated is the test to determine whether the shareholder so controls the corporation that he can be held liable for all wrongful corporate acts. That, and nothing more, is the inquiry required by *Bestfoods*. Even if state common law allows transaction-specific veil piercing, as the Sixth Circuit interpreted Ohio law to allow here, CERCLA does not incorporate that rule, since, as *Bestfoods* explains, the relationship between the shareholder and the transaction is relevant only to CERCLA's direct liability inquiry and *must not be examined* in determining derivative liability. 524 U.S. at 67. See also *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-99 (1991) (federal statutes that implicitly incorporate rules of state corporation law do not incorporate those particular rules that are inconsistent with federal law or policy).

The Sixth Circuit refused to accept this analysis because it expressed concern that petitioners'

> argument, if we adopted it, would straightjacket the courts in situations where equity demands that the fiction of corporate personhood be ignored. Consider, for example, a case in which a corporation with a single

> shareholder kept immaculate corporate records, observed all the formalities required by corporate law, and was adequately capitalized. The shareholder never commingled funds, and never held himself out as personally liable for the corporation's debts. The corporation even does some legitimate business. Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities?

App., *infra*, 8a.

But in fact, this Court has already considered precisely that situation. In *Bestfoods*, the Court explained in a parenthetical that

> [t]here are instances in which the parent has not sufficiently overstepped the bounds of corporate separateness to warrant piercing, yet is involved enough in the facility's activities that it should be held liable as an operator. Imagine, for example, a parent who strictly observed corporate formalities, avoided intertwining officers and directors, and adequately capitalized its subsidiary, yet provided active, daily supervision and control over hazardous waste disposal activities of the subsidiary. Such a parent should not escape liability just because its activities do not justify a piercing of the subsidiary's veil.

524 U.S. at 66 n.12 (internal quotation marks and ellipses omitted). As the Court explained, this scenario calls for holding the shareholder *directly* liable for his involvement in the wrongful transactions. It does not warrant *indirect* liability.

In the instant case, the district court has already found that, because of his personal involvement in the wrongful acts, Denune is directly liable for 30% of the cleanup costs. That is the very result contemplated in *Bestfoods*, and it ensures that Denune cannot use the corporate form to escape personal liability. But to hold Denune liable also for Dixie's portion of the costs based on the *exact same* personal involvement, notwithstanding the fact that he did not generally control the corporation to a degree sufficient to pierce the corporate veil, is to disregard the holding of *Bestfoods* and to conflate the two theories of liability that this Court took pains to separate. Indeed, if a shareholder can be derivatively liable for controlling the wrongful acts of a corporation, there is no need for direct liability analysis at all. Cf. *Bestfoods*, 524 U.S. at 70 ("Indeed, if the evidence of common corporate personnel acting at management and directorial levels were enough to support a finding of a parent corporation's direct operator liability under CERCLA, then the possibility of resort to veil piercing to establish indirect, derivative liability for the subsidiary's violations would be academic.").

It was the lower courts' failure to distinguish properly between direct and indirect liability that prompted this Court to intervene in *Bestfoods* in the first place. See 524 U.S. at 60, 67-68. If the Court does not do the same here, the central holding of *Bestfoods* will be gutted, and confusion will once again reign in the circuits. The Court should grant certiorari to avoid that result. See Sup. Ct. R. 10(a).

## II. The Sixth Circuit Has Created A Conflict Among The Courts Of Appeals On The Question Whether Certification Is Appropriate In These Circumstances

Leaving aside the question whether transaction-specific indirect CERCLA liability is even permissible under *Bestfoods*,

the Sixth Circuit defied core principles of federalism and comity by relying solely on Ohio intermediate appellate court opinions to recognize such a theory of liability without first certifying the question to the Ohio Supreme Court, which has not yet addressed the issue and, if anything, has indicated an unwillingness to sanction it. The same result would not have ensued in numerous other circuits.

This Court has long recognized that certification "helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). In furtherance of federalism principles, certification places "state law questions in [the only] courts equipped to rule authoritatively on them." *Arizonans For Official English* v. *Arizona*, 520 U.S. 43, 75-76 (1997). By certifying, a federal court ensures that it does not usurp the state courts' function in establishing state policy. By contrast, a federal court that does not certify when faced with a difficult issue of state law that has not been resolved by the state's highest court "make[s] important state policy, in contravention of basic federalism principles." *Hakimoglu* v. *Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 & n.9 (3d Cir.1995) (opinion of Becker, J.). "When * * * a federal court fails to certify, the highest court of the state is denied the right to decide whether it wishes to resolve the issue. The loser loses because a court that has no ultimate say as to the applicable law has made itself into a court of last resort." *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 159 n.4 (2d Cir. 1997) (Calabresi, J., dissenting). "When federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity." *Id.* at 158.

With these concerns in mind, the Second Circuit has explicitly held that "[c]ertification is particularly appropriate when * * * there is some law in the intermediate state courts, but no definitive holding from the state's highest tribunal."

*Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998) (citing and endorsing Judge Calabresi's dissent in *McCarthy*, *supra*). See also *McCarthy*, 119 F.3d at 161 (Calabresi, J., dissenting) (certification is necessary in "virtually any case in which 1) a significant and dispositive issue of state law is in genuine doubt (despite the existence of non-binding lower court decisions, especially where those decisions * * * were never appealed to the state's highest court), and 2) certification is specifically requested by the party that did not invoke federal court jurisdiction").

That is precisely the situation here. There is absolutely no indication in the precedents of the Ohio Supreme Court that the veil-piercing inquiry should turn on the degree of control exercised by the shareholder over the wrongful transaction. The only Ohio cases relied upon by the Sixth Circuit to support its conclusion that the corporate veil can be pierced when the shareholder exercised control over the single transaction at issue in the case are *Janos* v. *Murduck*, 672 N.E.2d 1021 (Ohio Ct. App. 1996), and *Sintel, Inc.* v. *Budget Systems*, No. 74249, 1999 WL 401409 (June 17, 1999), both decisions of Ohio's intermediate appellate courts that were never appealed to the Ohio Supreme Court. See App., *infra*, 9a-10a & n.6.

It is true that some courts and commentators have appeared to endorse the control-over-the-transaction-alone test adopted by the Sixth Circuit. See, *e.g.*, *Angelo Tomasso, Inc.* v. *Armor Constr. & Paving, Inc.*, 447 A.2d 406 (Conn. 1982); FLETCHER CYC CORP § 41.10. But others clearly have not. For instance, New York courts have held that "a party seeking to pierce the corporate veil must plead and prove * * * complete dominion and control of the [corporation] by the [shareholder], *not only generally, but [also] with respect to the transaction at issue*." *Eastern States Elec. Contractors, Inc.* v. *William L. Crow Constr. Co.*, 544 N.Y.S.2d 600, 602 (N.Y. App. Div. 1989)

(emphasis added). Many other courts have also emphasized that the shareholder must exercise control over the corporation's affairs generally, not just its actions in a specific incident. See, *e.g.*, *In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d 1015, 1017 (Ill. 1994) (corporate veil may be pierced only "where a [corporation] is organized and controlled, and its affairs conducted by a [shareholder]"); *Keith* v. *Woodul*, 616 S.W.2d 375, 377 (Tex. Civ. App. 1981) (corporate veil may be pierced only "where an individual controls and manages the corporation in such a manner that its affairs are indistinguishable from the individual's personal affairs, and it has thus become his alter ego").

The Ohio Supreme Court's precedents strongly suggest an inclination to side with those courts that have *not* adopted a control-over-the-transaction-alone test. As noted above, in *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993) — which the Sixth Circuit acknowledged to be the Ohio Supreme Court's leading decision on veil-piercing (App., *infra*, 6a) — the court held that

> the corporate form may be disregarded when *(1) domination and control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will, or existence of its own;* (2) that domination and control was used to commit fraud or wrong or other dishonest or unjust act, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

617 N.E.2d at 1086 (emphasis added; internal quotation marks omitted). The requirement of control over the specific transaction is seemingly encompassed within the second prong of the *Belvedere* test. The first prong — which also must be met in every case — requires *in addition* complete control over

the entire existence of the corporation. Thus, the *Belvedere* court made clear that "to succeed a plaintiff must show that the individual and the corporation are fundamentally indistinguishable." *Ibid.*

It is true that one cannot determine with certainty from this language that the Ohio Supreme Court would reject the test adopted by the Sixth Circuit here. But it is equally indisputable that this language calls into significant question whether the Sixth Circuit reached the right result. In these circumstances — where the case presents a dispositive issue of state law that has divided courts across the country and has not yet been resolved by the state supreme court, though there is some potentially relevant authority from the state intermediate appellate courts, which authority conflicts with indications to the contrary in the opinions of the state s high court — certification is essential.

As Judge Calabresi has explained, "[i]n such cases, and in the absence of certification, the party that is favored by the lower court decisions will almost invariably seek federal jurisdiction. It will do this in order to prevent the state's highest court from reaching the issue, in the expectation that the federal court — unlike the state's highest court — will feel virtually bound to follow the decisions of the intermediate state courts." *McCarthy*, 119 F.3d at 157-58 (dissenting opinion).[1] In other words, as the Seventh Circuit has explained, if the federal courts answer the question themselves rather then certifying to the state supreme court, the result is to "funnel all similar

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[1] Indeed, the Sixth Circuit has adopted a rule that, "where a state appellate court has resolved an issue to which the high court has not spoken," the Circuit will "normally treat those decisions as authoritative." *Kurczi* v. *Eli Lilly & Co.*, 113 F.3d 1426, 1429 (6th Cir. 1997) (internal quotation marks, brackets, and ellipsis omitted).

litigation [in]to federal court." *Todd* v. *Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (Easterbrook, J.) (en banc).

> If the federal court treats the plaintiff more favorably than the state tribunal [might], then the plaintiff always files in federal court; similarly any departure in the [defendant's] favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely *state* law.

*Ibid.*[2] The failure to certify in these circumstances thus has the functional effect of giving the federal courts the final word on an issue of state law and policy.

Reflecting this concern, Rule 18 of the Ohio Supreme Court Rules of Practice expressly states that certification is warranted whenever there is no controlling precedent from the State's *highest court*. See Ohio S. Ct. Prac. R. 18 § 1 ("This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.").

Yet the Sixth Circuit refused to certify, thus depriving the Supreme Court of Ohio of the opportunity to establish a

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[2] In this regard, the failure to certify leads to the very forum shopping that *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 73-77 (1938), was intended to prevent. See *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (noting that one of the aims of the *Erie* decision was "discouragement of forum-shopping"); *McCarthy*, 119 F.3d at 157 (Calabresi, J., dissenting).

fundamental rule of corporate law — a rule that will have significant impact on the public policy of the State of Ohio.

Had this case arisen in the Second Circuit, these very concerns would have led the court to certify to the Ohio Supreme Court. Indeed, this is *precisely* the situation in which the Second Circuit has recognized the necessity to certify. See *Liriano*, 132 F.3d at 132; *McCarthy*, 119 F.3d at 161 (Calabresi, J., dissenting).

The Fifth and Ninth Circuits also would have certified here. See *Grubbs* v. *Gulf Int'l Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993) (certifying where there were two decisions on point from the state intermediate appellate courts, but no controlling decision from the state supreme court, and the state supreme court's precedents in related cases appeared to be in some tension with the lower court rulings); *In re KF Dairies, Inc.*, 179 F.3d 1226, 1226-27 (9th Cir. 1999) (same).

So too would the Eleventh Circuit. See *Blanchard* v. *State Farm Mut. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990) ("The district court, applying existing Florida intermediate appellate law, dismissed plaintiffs-appellants' complaint because it decided that joinder of the bad faith claim with the underlying contractual action was mandatory. We have determined that this question of Florida law is dispositive of this case and that there is no controlling precedent from the Supreme Court of Florida; we, therefore, certify this question to the Florida Supreme Court for resolution."). The Eleventh Circuit has held that, "[w]here there is *any doubt* as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law." *Colonial Properties, Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th

Cir. 1996) (emphasis added; internal quotation marks and footnote omitted). It can hardly be suggested that that liberal standard is not met here.

By refusing to certify, the Sixth Circuit has brought itself into conflict with these other circuits. See also *Reasbeck* v. *Wheeling Pittsburgh Steel Corp.*, No. 99-3441, 2000 WL 1434582, at **3 (6th Cir. Sept. 18, 2000) (unpublished) (explicitly declaring that the Sixth Circuit will not certify to a state supreme court where there are decisions on point from the state's intermediate appellate courts).

Indeed, the conflict runs even deeper — and the Sixth Circuit's decision is even more disturbing — when one considers the fact that there are some decisions of the Ohio intermediate appellate courts that cut heavily *against* the test the Sixth Circuit distilled from other Ohio appellate opinions. For instance, in *Willoway Nurseries* v. *Curdes*, No. 98CA007109, 1999 WL 820784 (Ohio Ct. App. Oct. 13, 1999), an Ohio appellate court interpreted the Ohio Supreme Court's decision in *Belvedere* thusly:

> The basis of the *Belvedere* test is the alter ego doctrine. "[T]o succeed a plaintiff must show that the individual and the corporation are fundamentally indistinguishable." The factors used to determine if this standard has been met include: (1) whether corporate formalities were observed; (2) whether corporate records were kept; (3) whether corporate funds were commingled with personal funds; and (4) whether corporate property was used for a personal purpose. *LeRoux's Billyle Supper Club* v. *Ma*, 602 N.E.2d 685 (Ohio Ct. App.1991).

1999 WL 8207894, at *4 (some citations omitted). See also App., *infra*, 7a (collecting Ohio appellate cases that post-date

*Belvedere* and continue to use this multi-factor test). These factors all concern the general degree of control exercised by the shareholder over the corporation, not the degree of control exercised by the shareholder over the particular transaction. As such, they indicate that the focus under Ohio law must be placed on the relationship between the shareholder and the corporation. See also, *e.g.*, *Kays* v. *Sheregardus*, 740 N.E.2d 1123, 1127 (Ohio Ct. App. 2000).

Where, as here, there are potentially conflicting decisions of the intermediate state appellate courts, other circuits have not hesitated for a moment to certify. See, *e.g.*, *Bocre Leasing Corp.* v. *General Motors Corp.*, 20 F.3d 66, 68 (2d Cir. 1994); *Kelley* v. *Integon Indem. Corp.*, 726 F.2d 1519, 1520 (11th Cir. 1984). The decision below, which reflects the Sixth Circuit's practice of refusing to certify in circumstances such as this, is irreconcilable both with these cases and with core principles of federalism.

In sum, this case presents a fundamental and tremendously important issue that has divided the courts of appeals. This Court should grant certiorari to resolve the conflict and, as in *Lehman Bros.*, to emphasize the importance of certification to principles of federalism. See S. Ct. R. 10(a).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TERENCE L. GALLAGHER
KEITH A. KAVINSKY
*Gallagher & Kavinsky*
*400 South Fifth Street*
*Suite 304*
*Columbus, OH 43215*
*(614) 221-3536*

KENNETH S. GELLER
*Counsel of Record*
THOMAS B. COLBY
*Mayer, Brown & Platt*
*1909 K Street, N.W.*
*Washington, DC 20006*
*(202) 263-3000*

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